No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TEXACO, INC.,

Petitioner,

vs.

RICKY HASBROUCK, d/b/a
RICK'S TEXACO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF BOISE CASCADE CORPORATION

*VICTOR E. GRIMM
SCOTT M. MENDEL
TODD M. KOSSOW
BELL, BOYD & LLOYD
Three First National Plaza
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

DAVID G. GADDA
BOISE CASCADE CORPORATION
One Jefferson Square
Boise, Idaho 83728
(208) 384-6336
Counsel for Amicus Curiae

*Counsel of Record

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 87-2048

TEXACO, INC.,

Petitioner,

vs.

RICKY HASBROUCK, d/b/a
RICK'S TEXACO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF BOISE CASCADE CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Boise Cascade Corporation ("Boise Cascade") respectfully moves, pursuant to Rule 36.3 of the Rules of this Court, for leave to file the attached brief as amicus curiae. The brief is in support of petitioner, Texaco, Inc., to the extent petitioner contends that the *Morton Salt* inference of competitive injury is inapplicable to functional discounts. The consent of counsel for the petitioner has been obtained. The consent of counsel for the respondents was requested but refused.

Boise Cascade is interested in this appeal because: (1) Boise Cascade is the respondent in a Robinson-Patman action pending before the Federal Trade Commission ("FTC"), *Boise Cascade Corp.*, 107 F.T.C. 76 (1986), *rev'd and remanded, Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988), that involves issues similar to those presented in this appeal, and (2) as a dual distributor (*i.e.*, a reseller to dealers and end

users) of office products and a manufacturer of forest products that it sells to wholesalers, dual distributors and retailers, Boise Cascade receives and offers functional discounts, the lawfulness of which are placed in question by the decision of the Ninth Circuit.

This Court's analysis of the Robinson-Patman Act's competitive injury requirement could have a significant impact on the ultimate resolution of the *Boise Cascade* matter. Moreover, this appeal has serious implications for distribution systems that are employed in numerous industries throughout the United States, including those in which Boise Cascade participates as a manufacturer or distributor. For these reasons, Boise Cascade seeks to appear as amicus curiae to present its views on one important issue posed in this appeal — the applicability of the *Morton Salt*[1] inference of competitive injury to functional discount pricing practices.

In their briefs on the petition for certiorari, Texaco and the respondents, as well as the United States and other amici, discussed the FTC decision in *Boise Cascade* and the decision of the District of Columbia Court of Appeals reversing and remanding that decision. As a litigant in those continuing proceedings for over thirteen years, Boise Cascade respectfully suggests that the Court may benefit from its views on the decisions in *Boise Cascade* and their relationship to Texaco's appeal.

In the *Boise Cascade* matter, the FTC challenged Boise Cascade's receipt of a wholesale functional discount under Section 2(f) of the Robinson-Patman Act, 15 U.S.C. § 13(f).[2] The FTC found that Boise Cascade violated the Act by accepting

[1] *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

[2] Section 2(f) makes it unlawful "for any person . . . knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. § 13(f).

functional discounts on goods resold to end users, even though such discounts were offered by office products manufacturers on the basis of objective standards to all wholesalers and dual distributors. In so finding, the Commission inferred a lessening of competition from the mere existence of the functional discounts, ignoring specific evidence of the absence of competitive injury. The District of Columbia Circuit granted Boise Cascade's petition for review and remanded the case to the FTC for assessment of the specific evidence bearing on the issue of competitive injury. *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127, 1148 (D.C. Cir. 1988). The case was reargued before the FTC on July 28, 1988, and is awaiting decision. This Court's determination of the proper application of the Robinson-Patman Act's competitive injury requirement to functional discounts could have a material effect on the resolution of *Boise Cascade*.

Aside from the FTC litigation, Boise Cascade is interested in this appeal because of its role as a dual distributor of office products and as a seller of forest products to wholesalers, dual distributors and retailers. Functional discounts and dual distribution are both longstanding and prevalent practices throughout the United States economy. In the office products industry, manufacturers have employed functional discounts for over 40 years. Such discounts are offered to induce distributors to undertake distribution and marketing functions required for efficient distribution of manufacturers' products. The record in *Boise Cascade* demonstrates that manufacturers in the office products industry, like Texaco in this case, extend functional discounts to all companies, regardless of size, that meet the manufacturers' objective criteria.

The approach of the Ninth Circuit in this case casts substantial doubt on the lawfulness of functional discounts in all industries and may, as a practical matter, preclude their use in most situations. Thus, the implications of the present case

are not limited to Texaco's pricing practices in Spokane, Washington, but potentially affect distribution systems utilized throughout the Nation's economy. Because Boise Cascade has carefully analyzed the competitive effects of functional discounts in the office products industry in the course of the FTC litigation and because Boise Cascade can capably represent the interests of manufacturers, wholesalers and dual distributors who grant or receive similar discounts, it is uniquely qualified to comment on the proper application of the Robinson-Patman Act to this pricing practice from the perspective of manufacturers and distributors alike.

Accordingly, Boise Cascade respectfully requests that leave be granted for the filing of its attached brief amicus curiae.

Respectfully submitted,

*VICTOR E. GRIMM
SCOTT M. MENDEL
TODD M. KOSSOW
BELL, BOYD & LLOYD
Three First National Plaza
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

DAVID G. GADDA
BOISE CASCADE CORPORATION
One Jefferson Square
Boise, Idaho 83728
(208) 384-6336
Counsel for Amicus Curiae

*Counsel of Record

August 3, 1989

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 87-2048

TEXACO, INC.,

Petitioner,

vs.

RICKY HASBROUCK, d/b/a
RICK'S TEXACO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF BOISE CASCADE CORPORATION

Boise Cascade Corporation ("Boise Cascade") respectfully submits this brief as amicus curiae pursuant to Supreme Court Rule 36.2. Boise Cascade's brief is limited to the second "question presented" by the Petitioner Texaco.[1] To the extent petitioner contends that the *Morton Salt* inference of competitive injury is inapplicable to functional discounts, Boise Cascade's brief is in support of the petitioner.

---

[1] The second "question presented" in Texaco's petition is as follows:

> Whether the *Morton Salt* "self-evident" inference of injury to competition from sales over time to competing customers at different prices (334 U.S. at 50) has any application to the age-old practice of selling to wholesalers at lower prices than to retailers?

(Pet. App. at i)

INTEREST OF AMICUS CURIAE

As described more fully in the attached motion, Boise Cascade is interested in the outcome of this appeal because it functions as a dual distributor (*i.e.*, a reseller to dealers and end users) of office products and is the respondent in a case currently pending before the Federal Trade Commission ("FTC") involving issues similar to those presented here. *See In re Boise Cascade Corp.*, No.9133. The FTC matter is on remand from the Court of Appeals for the District of Columbia Circuit for reconsideration of the proper application of the competitive injury requirement of the Robinson-Patman Act to functional discounts in a dual distribution setting. *See Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988). In addition, as an integrated forest products company, Boise Cascade distributes many of its products through wholesalers, dual distributors and retailers. Boise Cascade is representative of the many business enterprises that distribute their products, and those of other manufacturers, through complex, multi-tiered distribution systems. In such systems, manufacturers provide price differentials that recognize differing functions performed by distributors operating at various levels of distribution. Such pricing practices are prevalent throughout the Nation's economy, and proper application of the Robinson-Patman Act to these practices is important to the development and preservation of efficient distribution systems.

The second "question presented" to this Court by the Petitioner Texaco concerns the applicability of the *Morton Salt*[2] inference of competitive injury to functional discounts. Resolution of this issue will have a considerable impact on the distribution structure of American industry. If functional discounts are presumed to injure competition as found by the

[2] *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

Ninth Circuit, many suppliers would be compelled to discontinue those discounts, and many dual distributors would be forced to withdraw from one level of distribution. The result would be a restructuring of distribution systems and a reduction in competition inconsistent with the purposes of the Robinson-Patman Act and the other antitrust laws. *See Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979); *White Industries, Inc.* v. *Cessna Aircraft Co.*, 845 F.2d 1497, 1503 (8th Cir.), *cert. denied*, ___ U.S. ___, 109 S. Ct. 146 (1988). Thus, it is critical that this Court clarify the proper application of the competitive injury requirement of the Robinson-Patman Act to functional discount pricing systems.

SUMMARY OF THE CASE

In the proceedings below, Texaco was found liable under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), for making sales of gasoline to independent wholesalers at lower prices than it charged to plaintiffs who operated retail service stations. The plaintiffs contended that they suffered competitive injury as a result of the price differential, despite the fact that the allegedly favored wholesalers operated at a different distributional level. The Ninth Circuit agreed, holding that competitive injury could be inferred from the existence of the price difference. *Hasbrouck* v. *Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1988). The court concluded that such an adverse competitive effect was "obvious and foreseeable," even though the plaintiff-retailers and the wholesalers performed different marketing functions. *Id.* at 1040. Thus, the court below concluded that once a significant price differential between distributors is established, competitive injury is assumed, and it is the seller's duty to justify its pricing policy under the Act. *Id.* at 1041.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision below represents an unprecedented extension of the *Morton Salt* inference of competitive injury to price differentials arising from functional discounts.[3] This extension of the inference is fraught with anticompetitive potential. Boise Cascade respectfully submits that there is a strong basis in the legislative history of the Act, this Court's prior decisions and sound economics, to hold the *Morton Salt* inference inapplicable to functional discounts.

The legislative history of the Act makes clear that Congress was primarily concerned with the competitive threat posed by quantity discounts extracted by large buyers, not functional discounts accorded even-handedly to wholesalers and dual distributors as compensation for the distribution functions they perform. Consistent with this legislative concern, the Court found in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), that injury to competition was "self-evident" in a scheme of volume discounts that provided dramatically lower prices to the seller's five largest customers. In *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), the Court applied a similar inference to arbitrary price discriminations based on the location of the purchaser. These arbitrary and economically unjustified pricing practices were of the type that animated Congress in its passage of the Act. Moreover, it was plausible to infer that these discriminatory practices had anticompetitive potential, particularly in light of the actual evidence of competitive injury in both cases.

[3] As used in this brief, the term "functional discounts" refers to discounts provided by sellers to compensate distributors for activities performed and costs incurred in connection with the distribution or marketing of sellers' products.

By contrast, functional discounts logically distinguish between distributors that perform different distribution and marketing activities. When such discounts are even-handedly employed in a competitive market, the discounts are procompetitive because they foster the development of efficient distribution systems. Thus, this Court's prior decisions do not support application of the inference of competitive injury to functional discounts offered to wholesalers and dual distributors. Extension of the inference of competitive injury created by the Court in *Morton Salt* to a practice quite different from that which gave rise to the inference is both unwarranted and capable of perverse competitive consequences. Such a holding would inhibit a manufacturer's ability to transfer distribution functions to those who can perform them most efficiently.

Nevertheless, if the inference of competitive injury were to be extended to functional discounts, Boise Cascade submits that the inference should be applied with the care dictated by the District of Columbia Circuit's decision in *Boise Cascade*. Such an approach requires an assessment of the purposes of the discount and its potential and actual competitive effects in a particular factual setting. Application of the Act in this manner would minimize the potential for unwarranted disruption of efficient distribution systems caused by overbroad application of the inference.

ARGUMENT

I. THE *MORTON SALT* INFERENCE OF COMPETITIVE INJURY SHOULD NOT BE EXTENDED TO FUNCTIONAL DISCOUNT PRICING SYSTEMS.

The Ninth Circuit held that injury to competition may be inferred from the fact that Texaco charged lower prices to wholesalers than to direct-buying retailers. Neither the legislative history of the Robinson-Patman Act nor prior

decisions of this Court support such an unprecedented extension of the inference of competitive injury created in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

As this Court has stated, the Robinson-Patman Act "was passed in response to the problem perceived in the increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers." *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 75-76 (1979). The legislative history makes clear that Congress sought to prohibit the favoritism toward large buyers that had arisen from the original Clayton Act's allowance of *quantity discounts*. *See Morton Salt*, 334 U.S. at 43-44. The Act "in short, sought to remove the competitive advantage conferred solely by virtue of the size of the buyer's appetite." *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127, 1138 (D.C. Cir. 1988).

It was in this paradigm Robinson-Patman Act setting that the Court decided *Morton Salt*. At issue there was a salt manufacturer's *volume discount* pricing system structured so that only five large retail chains qualified for the best discount. The larger discount enabled these favored purchasers to reduce their *resale* prices below the level at which their smaller retail competitors could buy the product. *Morton Salt*, 334 U.S. at 41. The Court observed that the volume discount in *Morton Salt* was precisely the type of pricing practice Congress intended to address through the Robinson-Patman Act. *Id.* at 43-44. In that context, the Court found it "self-evident" "that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Id.* at 50. In reaching that conclusion, the Court also relied on the substantial record evidence of widespread economic losses resulting in diminished competition:

> It [the FTC] heard testimony from many witnesses in various parts of the country to show that *they had suffered actual financial losses on account of respondent's discriminatory prices.* Experts were offered to prove the tendency of injury from such prices. *The evidence covers about two thousand pages,* largely devoted to this single issue — injury to competition.

Id. (emphasis added). What the Court found "self-evident" in *Morton Salt* was informed by substantial practical experience with the volume pricing practice at issue and by direct evidence of competitive injury.

Unlike the volume discounts in *Morton Salt*, functional discounts were not perceived by Congress as a tool used by power buyers to destroy competition. Such discounts are offered by manufacturers to compensate distributors for the activities they undertake in the distribution or marketing of products that would otherwise be performed by the manufacturer. Through functional discounts, manufacturers achieve efficiencies by shifting distributive functions to those who can most effectively perform them. The legislative history of the Act reveals that Congress was well aware of the long-established use of functional discounts. *See* IV E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 2966-67, 3206, 3216 (1978) ("Kintner"). Indeed, the chief sponsor of the Act specifically stated with respect to the grant of functional discounts to dual distributors:

> There is nothing in the Act that prohibits a seller from giving a wholesaler-retailer the wholesale functional discount *on all his purchases, both those he purchases for resale to others and those he buys for retailing* through his own retail outlet. This is true as long as he performs the wholesale function on all his purchases.

W. Patman, *Complete Guide to the Robinson-Patman Act* 30 (1963) (emphasis added).[4] Thus, as the District of Columbia Circuit noted in *Boise Cascade*, a functional discount accorded to all wholesalers and dual distributors that qualify on the basis of objective standards "is scarcely a paradigmatic Robinson-Patman Act case." *Boise Cascade*, 837 F.2d at 1139 n.14.

Prior to the Ninth Circuit's decision in *Hasbrouck*, no court had condemned functional discounts absent direct evidence establishing their anticompetitive potential or evidence that their use was a subterfuge to avoid the Act. The court below cited *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), in support of its application of the inference of injury, *see Hasbrouck* v. *Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1988), but *Falls City* involved an arbitrary geographic price differential to competing distributors unrelated to the functions they performed. That arbitrary price differential was facilitated by state alcohol control laws and was accompanied by substantial "direct evidence of diverted sales" that were clearly attributable to the price differential. *Falls City*, 460 U.S. at 437. The evidence showed that numerous Indiana residents drove several miles into Kentucky to make "substantial purchases of beer" in violation of Indiana law because of the lower prices Kentucky distributors could offer as a result of the price discrimination. *Id.* at 433, 437 n.8. Thus, the Court found that in the absence of rebuttal evidence, competitive injury could be inferred.

Because *Falls City* involved the sort of arbitrary, non-economically justified price discrimination that concerned

[4] Mr. Teegarden, chief draftsman of the Act, stated during the legislative debates that "so far as he [the integrated wholesaler or dual distributor] does effect an economy there is nothing in this bill to prevent that economy from being translated to the consumer." Kintner, at 2966.

Congress, and because of the existence of substantial evidence of the actual competitive effects of the price differential, that case falls neatly beside *Morton Salt* in Robinson-Patman jurisprudence. It does not follow, however, that *Falls City* supports a mechanical application of the inference of injury to price differentials arising from functional discount pricing systems that rationally distinguish between different activities performed by wholesalers and dual distributors on the one hand and retailers on the other. As the District of Columbia Circuit in *Boise Cascade* correctly concluded, cases involving functional discounts simply are "not of the lineage of *Morton Salt*." *Boise Cascade*, 837 F.2d at 1139 n.14. Thus, contrary to the opinion of the court below, *Falls City* does not require, or even support, application of *Morton Salt's* "self-evident" inference in the circumstances of this case. *See Boise Cascade*, 837 F.2d at 1151-52 (Williams, J., concurring).

It is also important to note that the *Morton Salt* inference of competitive injury is not derived from any language in the statute. Indeed, the Act requires a showing that the price discrimination may substantially lessen competition. The inference was created by the Court in a context where the existence of competitive injury was a compelling conclusion. However, it is illogical to extend this judicially-created device to factual settings where competitive injury is neither apparent nor the most plausible result of a price differential. This Court has cautioned against such overly broad applications of the Robinson-Patman Act that can result in price uniformity and rigidity that is antithetical to the antitrust laws. *See Great Atlantic & Pacific Tea Co.*, 440 U.S. at 80; *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63 (1953). In this case, the Ninth Circuit fell into the same error as the FTC in *Boise Cascade*. In *Boise Cascade*, the Court of Appeals chided the FTC for "entirely fail[ing] to inform its application of *Morton Salt's* inference of injury with the purposes of the Robinson-Patman Act." *Boise Cascade*, 837 F.2d at 1146.

In the Ninth Circuit's view, the inference is appropriate in highly competitive markets that are "strongly price sensitive." *Hasbrouck*, 842 F.2d at 1041. In such markets, an unjustified *volume* discount accorded to one competitor may well permit that competitor to achieve an economic advantage that will translate into competitive injury. However, it is precisely in such competitive circumstances that it may be necessary for manufacturers to offer *functional* discounts in order to induce wholesalers and dual distributors to undertake additional distributional and marketing functions. The performance of these functions requires distributors to incur additional costs that will further constrict already narrow profit margins. *See Boise Cascade*, 837 F.2d at 1152 & n.7 (Williams, J., concurring). In such circumstances, injury to competition is far from "self-evident." To the contrary, an inference of the absence of competitive injury is more plausible. Certainly, manufacturers in a competitive market will not voluntarily offer an additional discount if they do not believe that the wholesalers and dual distributors receiving it perform a valuable function in the distribution process. "[F]irms do not gratuitously turn profit opportunities over to other firms for no reason." *Id.* at 1151 (Williams, J., concurring).[5]

For these sound economic reasons, Robinson-Patman scholars have been highly critical of the unthinking

[5] The United States, in its brief on certiorari in this case, offered a similar analysis:

> In addition, market forces should tend to discourage a supplier from offering independent wholesalers discounts that would allow them to undercut the supplier's own retailer customers. A supplier would not normally find it profitable to offer independent wholesalers a discount in excess of the supplier's cost of providing the distribution services itself.

(U.S. Brief at 15)

application of the *Morton Salt* inference to pricing practices unlike those at issue in *Morton Salt*. Frederick Rowe, the preeminent Robinson-Patman scholar, has sharply criticized "talismanic incantations" of *Morton Salt* that "can foster economic discriminations and impede normal competitive price movements." Rowe, *The Federal Trade Commission's Administration of the Anti-Price Discrimination Law — A Paradox of Antitrust Policy*, 64 Colum. L. Rev. 415, 420-21 (1964). Rowe observes that the *Morton Salt* decision "ordained no blanket or conclusive presumption as to competitive injury" and concludes that the decision in that case was directly responsive to the factual circumstances:

> inasmuch as no countervailing considerations were pressed to mitigate the competitive impact of the challenged differential, the *Morton Salt* opinion's formulation was directly responsive to the issues and contentions in the case.

F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 182 (1962) (footnote omitted). Commentaries on the Act by other leading antitrust scholars support Rowe's conclusion that *Morton Salt* should be limited to similar factual circumstances. R. Posner, *The Robinson-Patman Act* 38-40 (1976) (Price differences that reflect the operation of a competitive market "should surely be permitted and indeed encouraged," and by confining application of *Morton Salt*, the Act can be limited to "practices that there is at least some economic basis for condemning."); R. Bork, *The Antitrust Paradox* 388 (1978) ("Substantial and sustained" price differences in competitive markets "necessarily reflect differences in the cost of doing business with different customers. Such differences arise from a variety of factors, including . . . . the performance of distributive functions by the customer . . . . ").

This Court recently observed in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986), that inappropriate use of inferences in antitrust cases can have serious anticompetitive consequences:

> [M]istaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition."

(citations omitted). Thus, by necessity, antitrust law "limits the range of permissible inferences from ambiguous evidence." *Id.* at 588; *see also Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 108 S. Ct. 1515, 1520 (1988). These admonitions are particularly applicable in Robinson-Patman cases in light of the Court's directive that the Act not be applied in a manner "in open conflict with the purposes of other antitrust legislation." *Automatic Canteen*, 346 U.S. at 63. [6]

Mechanical application of the *Morton Salt* inference, typified by the Ninth Circuit's decision in this case, would effectively render many price differences *per se* illegal. Under such an approach, a plaintiff "need only show that a substantial price discrimination existed as between himself and his competitors over a period of time." *See Hasbrouck*, 842

[6] The District of Columbia Circuit in *Boise Cascade* similarly stated that

> Robinson-Patman is not to be viewed as an act of Congressional schizophrenia, an anti-competitive island situated in an otherwise turbulent sea of pro-competitive efficiency and maximization of consumer welfare, the hallmark of the Nation's antitrust laws.

Boise Cascade, 837 F.2d at 1138.

F.2d at 1041. As the FTC acknowledged in *Boise Cascade*, "it may be difficult in most common commercial settings for a favored dual distributor to rebut the inference of injury." *Boise Cascade*, 107 F.T.C. at 211. This is especially so because under the Act it would be the seller's burden to prove the *absence of possible* competitive injury — a virtually impossible burden in many situations.[7]

Functional discounts distinguish logically between distributors based upon the different functions and activities they perform. It is often essential for a manufacturer to provide such discounts to induce distributors to incur the costs and risks of undertaking additional functions. As in the *Boise Cascade* situation, such functions may be performed by distributors who function at more than one distribution level. Nevertheless, where such dual distributors perform functions that a manufacturer deems valuable, injury to competition is hardly a compelling inference. To apply an automatic inference of injury in such a complex, multi-tiered distribution system would effectively preclude the courts from "distinguish[ing] between price differences which cause anticompetitive effects and those which reflect a 'desirable response to competition and considerations of efficiency.'" *Chrysler Credit Corp.* v. *J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982). Such a rule would discourage manufacturers from transferring distributional and marketing functions to the distributors that can perform those functions most efficiently. As a result, the development

[7] The practical significance of this burden is demonstrated by the position of FTC's complaint counsel even *after* the remand by the District of Columbia Circuit. Complaint counsel contends that evidence "tending to show the absence of an actual injury . . . would give rise, at best, to a bantamweight inference that must do battle against the heavyweight *Morton Salt* inference." (Complaint Counsel's Answering Brief at 7[illegible] *In re Boise Cascade Corp.*, FTC Dkt. No. 9133).

of more efficient modes of distribution would be retarded, and consumer welfare would be injured — a perverse application of the antitrust laws indeed.

II. IF THE *MORTON SALT* INFERENCE IS EXTENDED TO FUNCTIONAL DISCOUNTS, IT SHOULD BE APPLIED IN A MANNER CONSISTENT WITH THE PURPOSES OF THE ROBINSON-PATMAN ACT AND THE OTHER ANTITRUST LAWS.

If this Court were to determine that the *Morton Salt* inference should nevertheless be extended to functional discounts, Boise Cascade respectfully submits that the Court should adopt the analysis set forth by the District of Columbia Circuit in *Boise Cascade*. In *Boise Cascade*, the court held that the inference may be rebutted by evidence that competitive injury was unlikely as demonstrated, *inter alia*, by the continued competitive and economic success of the allegedly disfavored purchasers. *Boise Cascade*, 837 F.2d at 1144-47.

In analyzing the longstanding, even-handedly applied system of functional discounts employed in the office products industry, the Court of Appeals in *Boise Cascade* held that application of the *Morton Salt* inference "does not justify abdication of the duty to consider evidence indicating that a 'reasonable possibility' of harm does not, in fact, exist in the particular industry." *Id.* at 1146. The court admonished that "Robinson-Patman has not ushered in a bizarre rule of law that exalts theory 'no matter what' in the face of hard, cold facts." *Id.* The court pointed out that the competitive injury requirement of the Act dictates a "fact-intensive" analysis of "the competitive terrain upon which the players do battle." *Id.* at 1130.

In its initial decision in *Boise Cascade*, the FTC had adopted an approach to *Morton Salt* similar to that adopted by the

Ninth Circuit in this case. The FTC inferred injury to competition from a longstanding pricing practice that accorded a functional discount to all wholesalers and dual distributors, large and small. Such discounts were not provided to distributors who chose not to undertake the risks and costs of performing the wholesale functions required to meet the manufacturers' objective standards. In finding competitive injury, the FTC relied solely on the inference, acknowledging that FTC complaint counsel had presented no "direct evidence" of displaced sales attributable to the functional discount. *Boise Cascade*, 107 F.T.C. at 206. Nonetheless, the FTC refused to consider in rebuttal the substantial evidence

> (1) that competition among dealers generally was healthy, (2) that the selected dealers singled out for FTC examination were thriving, and (3) that this happy picture of prosperity was apparently unclouded by instances of diverted sales attributable to the challenged discounts.

Boise Cascade, 837 F.2d at 1143-44. The FTC deemed such evidence irrelevant in the face of *Morton Salt*'s "self-evident" inference. *Boise Cascade*, 107 F.T.C. at 208-09.

The District of Columbia Circuit correctly held that the *Morton Salt* inference "manifestly does not create an irrebuttable presumption of competitive injury." *Id.* at 1144. Observing that this Court had concluded in *Falls City*, 460 U.S. at 435, that the inference may be overcome "by evidence breaking the causal connection between a price differential and lost sales or profits," the Court of Appeals held that "[i]n reason, *the inference can also be overcome by evidence showing an absence of competitive injury within the meaning of Robinson-Patman.*" *Boise Cascade*, 837 F.2d at 1144 (court's emphasis). The court criticized the FTC for employing *Morton Salt* "to presume competitive injury conclusively" and held that

"[s]pecific, substantial evidence of [the] absence of competitive injury is, in our view, sufficient to rebut what is, after all, only an inference." *Id.*[8] As the Court of Appeals stated, the FTC's approach "is nothing less than an all-out attack on uniform wholesale prices to dual distributors." *Id.* at 1148.

In remanding the *Boise Cascade* case to the FTC, the court instructed the Commission to consider the evidence which indicated that no competitive injury had resulted or was likely to result from Boise Cascade's receipt of the functional discount, including: (1) the increasing sales and profits of the allegedly disfavored purchasers; (2) the "strikingly low" number of lost accounts and the fact that lost accounts were "very much a two-way street;" (3) the complete absence of evidence suggesting that any displaced sales were attributable to the functional discount; (4) that after 40 years of functional discounts, the industry remained "vibrant, dynamic" and highly competitive; and (5) the complete absence of a "regime of favoritism towards Boise" in that the manufacturers treated all wholesalers and dual distributors alike. *Boise*

[8] Properly applied, the *Morton Salt* "inference" operates as a legal presumption to shift the burden of producing evidence to the party against whom the inference was drawn. *See, e.g., Falls City*, 460 U.S. at 435; *Boise Cascade*, 837 F.2d at 1144; *see also Boise Cascade*, 837 F.2d at 1154 (Mikva, J., dissenting). This Court has held that a presumption is rebutted by the production of evidence sufficient to raise "a genuine issue of fact" as to the existence of the presumed fact. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981). Once such evidence is produced, the presumption is rebutted, and the burden shifts back to the plaintiff to present evidence sufficient to prove the presumed fact without the benefit of the rebutted presumption. *Id.* at 255; *see also Johnson* v. *Transportation Agency*, 480 U.S. 616, 107 S. Ct. 1442, 1449 (1987); *O'Brien* v. *Equitable Life Assur. Soc. of United States*, 212 F.2d 383, 386-87 (8th Cir. 1954). If plaintiff fails to produce such evidence, it does not satisfy its ultimate burden of persuasion. *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104, 111 (1941).

Cascade, 837 F.2d at 1144-47. The import of the court's remand is that a pricing practice should not automatically be condemned under the aegis of *Morton Salt* without an analysis of the precise competitive circumstances giving rise to the practice and the likely competitive consequences thereof. *See also* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 173, 181-82, 186-95 (1962).[9]

In determining the likely competitive impact of a pricing practice, it is critical to remember that the Robinson-Patman Act, like the other antitrust laws, "is directed to the preservation of competition" and not the protection of competitors against economic loss. *Boise Cascade*, 837 F.2d at 1143; *see also Richard Short Oil Co.* v. *Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986); *Foremost Pro Color, Inc.* v. *Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984). This basic principle is not merely an "oft-quoted chestnut" as the Ninth Circuit would have it. *See Hasbrouck*, 842 F.2d at 1040. Rather, as so aptly stated by the court in *Boise Cascade*, injury to competition is "*the name of the Robinson-Patman game*." *Boise Cascade*, 837 F.2d at 1143 (emphasis added). Price differentials are prohibited by the Act only if they tend to "injure, destroy, or prevent *competition with* any person who either grants or knowingly receives the benefit of such discrimination." 15 U.S.C. § 13(a) (emphasis added).

The legislative history of Robinson-Patman's injury standard makes clear that Congress sought to prohibit pricing practices that might lead to the destruction of *competition*, not merely lost revenue by individual competitors. *See, e.g.,*

[9] It should be noted that this Court has never sanctioned the use of the *Morton Salt* inference in a Section 2(f) case. This Court's prior decisions under Section 2(f) raise substantial doubt regarding the propriety of applying the inference in actions against a buyer that merely accepts the lower prices offered by sellers. *See Boise Cascade*, 837 F.2d at 1148 n.1 (Williams, J., concurring).

Kintner, at 3066, 3073-74, 3085, 3095, 3175, 3179, 3186, 3194-95, 3232, 3236, 3369, 3371-72. It is apparent from the congressional debates that the principal concern of Congress was to prevent large buyers from achieving a monopoly by "completely driv[ing] out of existence those who are engaged in like business with smaller capital." Kintner, at 3073. Therefore, the Act is implicated only where price differentials result in the likely impairment of a firm's ability to compete. *See Richard Short Oil*, 799 F.2d at 420 ("injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business").

Failure to thoroughly analyze the competitive facts can result in applications of the Robinson-Patman Act to pricing systems that present no risks to competition and that Congress did not intend to prohibit. Because functional discounts employed in competitive industries are most likely to be procompetitive and contribute to the efficient distribution of products, they should not automatically be condemned without analysis of their potential and actual competitive effects. Inappropriate applications of the statute would foster a pattern of constrained pricing and impose distribution practices that are at odds with the free and open competitive system that the antitrust laws are designed to preserve.

Boise Cascade respectfully submits that if the Court determines in this appeal that the *Morton Salt* inference is to be extended to price differentials arising from functional discounts, it should adopt the District of Columbia Circuit's approach in *Boise Cascade* to the application and rebuttal of the inference. The Court should require the lower courts and the FTC to consider in rebuttal of the inference all evidence bearing on the potential and actual competitive effects of the challenged discount, including evidence indicating the absence of competitive injury and evidence breaking the causal connection between the challenged discount and any

alleged competitive injury. A complete assessment of the competitive effects of a functional discount requires an evaluation of the structure of the particular industry, the history and purpose of the discount in that industry, the functions required to be performed in order to obtain the discount, the availability of the discount to the allegedly disfavored purchasers, the financial health and competitive vigor of the allegedly disfavored purchasers, the extent of new entry in the industry, the extent of sales diversion between favored and disfavored purchasers and the reasons for any such sales diversion — that is, whether it reflects the operation of a competitive market or a competitive advantage arising from the discount. Only in this way can the Robinson-Patman Act be limited to pricing practices that truly have anticompetitive potential.

CONCLUSION

Boise Cascade respectfully submits that this Court should hold that the *Morton Salt* "self-evident" inference of competitive injury should not be extended to functional discounts. However, if this Court determines to extend the inference to such discounts, Boise Cascade respectfully submits that the Court should require a full assessment of the facts bearing on competitive injury in determining whether the inference has been rebutted.

Respectfully submitted,

*VICTOR E. GRIMM
SCOTT M. MENDEL
TODD M. KOSSOW
BELL, BOYD & LLOYD
Three First National Plaza
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

DAVID G. GADDA
BOISE CASCADE CORPORATION
One Jefferson Square
Boise, Idaho 83728
(208) 384-6336
Counsel for Amicus Curiae

*Counsel of Record

August 3, 1989